

### 10.4.3 FMLA Damages — Other Monetary Damages

#### Model

The Family and Medical Leave Act provides that if an employee is unable to prove that the employer's violation of the Act caused the employee to lose any wages, benefits or other compensation, then that employee may recover other monetary losses sustained as a direct result of the employer's violation of the Act.

So in this case, if you find that [defendant] has violated [plaintiff's] rights under the Act, and yet you also find that [plaintiff] has not proved the loss of any wages, benefits or other compensation as a result of this violation, then you must determine whether [plaintiff] has suffered any other monetary losses as a direct result of the violation. [Other monetary losses may include the cost of providing the care that gave rise to the need for a leave.] [Plaintiff] has the burden of proving these monetary losses by a preponderance of the evidence.

Under the law, [plaintiff's] recovery for these other monetary damages can be no higher than the amount that [he/she] would have made in wages or salary for a twelve-week period during her employment. So you must limit your award for these other monetary damages, if any, to that amount. You must also remember that if [plaintiff] has proved damages for lost wages, benefits or other compensation, then you must award those damages only and [plaintiff] may not recover any amount for any other monetary damages suffered as a result of [describe defendant's conduct].

Finally, the Family and Medical Leave Act does not allow [plaintiff] to recover for any mental or emotional distress or pain and suffering that may have been caused by [defendant's] violation of the Act. So I instruct you that you are not to award the plaintiff any damages for emotional distress or pain and suffering.

[In assessing damages, you must not consider attorney fees or the costs of litigating this case. Attorney fees and costs, if relevant at all, are for the court and not the jury to determine. Therefore, attorney fees and costs should play no part in your calculation of any damages.]

#### Comment

The Family and Medical Leave Act provides that "in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks of wages or salary for the employee [can be recovered by a plaintiff]." 29 U.S.C. §2617(a). An award

1 for these non-wage-related monetary losses is contingent upon the plaintiff's *not*  
2 obtaining an award for lost wages. This instruction therefore provides that the jury is to  
3 reach the question of monetary losses other than lost wages only if it finds that the  
4 plaintiff has not proven damages for lost wages.  
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6 The FMLA does not provide for recovery for emotional distress or pain and  
7 suffering. *Lloyd v. Wyoming Valley Health Care Sys.*, 994 F.Supp. 288, 291 (M.D. Pa.  
8 1998) (reasoning that "the statute itself by including 'actual monetary compensation' as a  
9 separate item of damage places a limited definition on 'other compensation'"; concluding  
10 that "the plain meaning of the statute is that 'other compensation' means things which  
11 arise as a quid pro quo in the employment arrangement, and not damages such as  
12 emotional distress which are traditionally an item of compensatory damages"). *See also*  
13 *Coleman v. Potomac Electric Power Co.*, 281 F.Supp. 2d 250, 254 (D.D.C. 2003) :  
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15 Recovery under FMLA is "unambiguously limited to actual monetary losses."  
16 *Walker v. United Parcel Service, Inc.*, 240 F.3d 1268, 1277 (10th Cir. 2001). Other  
17 kinds of damages - punitive damages, nominal damages, or damages for emotional  
18 distress - are not recoverable. *See Settle v. S.W. Rodgers Co., Inc.*, 998 F. Supp.  
19 657, 665-66 (E.D. Va. 1998) (punitive damages and damages for emotional  
20 distress); *Keene v. Rinaldi*, 127 F. Supp. 2d 770, 772-73 & n.1 (M.D.N.C. 2000),  
21 *aff'd*, adopted 127 F. Supp. 2d 770 (M.D.N.C. 2000) (same).  
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23 In accordance with 29 U.S.C. § 2617(a), the court must double the amount of any  
24 damages under the FMLA, as liquidated damages, unless the defendant persuades the  
25 court that the violation was in good faith and that the employer had reasonable grounds  
26 for believing that the act or omission was not a violation of the FMLA— in which case  
27 the court has the discretion to limit the award to the amount of damages found by the jury.  
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### 30 *Attorney Fees and Costs*

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32 There appears to be no uniform practice regarding the use of an instruction that  
33 warns the jury against speculation on attorney fees and costs. The Third Circuit has not  
34 spoken on the propriety or necessity of such an instruction. Bracketed material is included  
35 for a court to use if it is concerned about jury speculation on attorney fees and costs. *See*  
36 *Fisher v. City of Memphis*, 234 F.3d 312, 319 (6<sup>th</sup> Cir. 2000), and *Brooks v. Cook*, 938  
37 F.2d 1048, 1051 (9<sup>th</sup> Cir. 1991), for concerns expressed about instructions involving  
38 attorney fees.